No. 16,018

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT SMITH BIGELOW, WILLIAM HUNTINGTON, GEORGE WILLOUGHBY and ORION SHERWOOD,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,243.

APPELLEE'S ANSWERING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from a conviction and sentence in the United States District Court for the District of Hawaii for criminal contempt of court. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). Jurisdiction of the case below was based on 18 U.S.C. §§ 401(3), 402 and 3231, as well as upon Rule 42(b), Federal Rules of Criminal Procedure.

STATUTE AND REGULATION INVOLVED.

Section 161 of the Atomic Energy Act (42 U.S.C. § 2201, 68 Stat. 948) provides in relevant part:

In the performance of its functions the [Atomic Energy] Commission is authorized to—

* * * * *

(i) prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

* * * * *

(q) make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.

Section 232 of the Atomic Energy Act (42 U.S.C. 2280) provides:

Injunction Proceedings

Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder, the Attorney General, on behalf of the United

States, may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

The contested Regulation of the Atomic Energy Commission (hereafter referred to as the Regulation) is set forth in full in Appendix "A", *infra.*

STATEMENT

On September 15, 1957, the Atomic Energy Commission and the Department of Defense issued notice of a proposed series of nuclear tests to begin in April 1958, at the Eniwetok Proving Grounds in the Pacific Ocean (2 R. 76).

On January 4, 1958, appellants (all except Sherwood) through a committee, of which they were a part, wrote the President of the United States urging him to cancel the tests (2 R. 38). On January 8, 1958, the committee again wrote the President that they intended to sail into the test area for the purpose of halting the tests (2 R. 40).

The Atomic Energy Commission, pursuant to authority granted under 42 U.S.C. 2201, issued a Regulation (23 F.R. 2401) effective April 12, 1958, designating specific portions of the Marshall Islands as a danger area during the "HARDTACK Test

Series," and prohibiting any American citizen or person subject to the jurisdiction of the United States from entering or attempting to enter the area during the course of the test series (Appendix A; 2 R. 7-9). After appellants made statements that they would sail to the test area and disregard the Atomic Energy Commission regulation, the United States Attorney for the District of Hawaii sought to restrain them from leaving Honolulu for the test area (2 R. 3-6). On April 24, 1958, Judge Jon Wiig of the United States District Court for the District of Hawaii issued a temporary restraining order preventing appellants from attempting to enter the designated area or from moving their vessel without permission of the Court (2 R. 10-13). On May 1, 1958, the Government's motion for a preliminary injunction and the appellants' motion to vacate the temporary restraining order were heard by Judge Wiig.

On the basis of an affidavit of Kenneth Fields, the General Manager of the Atomic Energy Commission, which stated that appellants' "action will impede the efficient and early completion of the HARDTACK series" (2 R. 76-9), and an affidavit by Admiral Arleigh Burke, Chief of Naval Operations, which stated that appellants' entry into the test area "will in fact interfere with the conduct of the tests", that "such interference is contrary to the security interests of the United States" and that "these United States nationals have not been authorized to participate in, witness or otherwise have access to the highly classified information which will be revealed during the

tests," (2 R. 82-4), Judge Wiig found that "[if] the defendants were allowed to enter or attempt to enter the aforesaid danger area, such act would preclude the effective enforcement of the Atomic Energy Act and would necessarily delay or interrupt the nuclear test series. . . ." He found as a matter of fact that appellants were American citizens and therefore subject to the AEC Regulation. Judge Wiig therefore found and concluded that the United States would suffer immediate and irreparable injury, and issued preliminary injunction restraining appellants from entering or attempting to enter the test area and from moving their vessel without the court's consent (2 R. 55-9).

Mr. Katsuro Miho, one of appellants' attorneys in the court below, informed the court that they "intended to go, regardless of the temporary injunction" (2 R. 117).

Shortly after the court adjourned and during the noon hour of the same day, appellants were apprehended by the Coast Guard while sailing their vessel out of Honolulu harbor in violation of Judge Wiig's order (1 R. 66-8).

On May 7, 1958, each appellant was found guilty of criminal contempt and sentenced to sixty days confinement, enforcement of which was suspended and appellants were placed on probation for one year (1 R. 20-3). This appeal is from that conviction.[1]

[1]Thereafter, appellant Bigelow announced that he would sail appellants' vessel to the test area beginning June 4, 1958. On that date, he was arrested for conspiracy to violate the temporary in-

SUMMARY OF ARGUMENT.

Appellants in their brief adopt points I through IV of the argument made in appellant's brief in *Reynolds v. United States*, No. 16,249 (pp. 9-68). We respectfully ask the Court that our answering arguments to those points in the *Reynolds* case be accepted here as the answers to the same points raised by these appellants. However, we do not consider the arguments in *Reynolds* under Point II to have any relevancy here inasmuch as that point in the *Reynolds* case involved a criminal prosecution for violation of the Regulation, whereas here this feature is absent.

Additional arguments to be made here are:

I. The Regulation of the A.E.C. did not unconstitutionally violate the appellants' right to freedom of

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junction, and on June 6 was sentenced to sixty days imprisonment. Appellants Huntington, Willoughby and Sherwood did sail the vessel out of the harbor on June 4 but were intercepted by the Coast Guard and escorted back to port. These three appellants pleaded guilty and were sentenced on June 5, 1958 to serve sixty days for contempt. All four appellants served their sixty days sentences. (James Peck had joined Huntington, Willoughby and Sherwood on June 4 in their attempt to sail the craft to the test area. He was sentenced to sixty days for contempt, execution of the sentence being suspended, and he was placed on probation for one year.)

On May 23, 1958, this Court of Appeals denied appellants' motion for a stay and vacation of the preliminary injunction issued by Judge Wiig (per curiam order in *Bigelow, et al. v. U.S.*, No. 16,012). Appellants appealed the temporary injunction to this Court but the appeal was dismissed by stipulation in August 1958. On June 6, 1958, the appellants filed an application with the Supreme Court of the United States for an order staying all proceedings and suspending, vacating, or modifying the preliminary injunction. This application was denied by Mr. Justice Douglas on June 20, 1958. The Regulation having been revoked at the end of the test series, on November 14, 1958, the preliminary injunction was dissolved and the action dismissed as moot.

religion, contrary to the guarantee of the First Amendment.

II. The Regulation was validly issued without notice or opportunity for hearing because it was issued under the exceptions in respect thereto contained in the Administrative Procedure Act.

III. Finally, appellants cannot here collaterally attack the Regulation or the act under which it was issued. The court below had jurisdiction of the persons and the subject matter and therefore the appellants disobeyed the court's order at their own risk.

ARGUMENT.

I.

APPELLANTS WERE DENIED NO CONSTITUTIONALLY GUARANTEED RIGHTS TO FREEDOM OF RELIGION.

Appellants complain that the Regulation and the temporary restraining order here involved violated their rights to freedom of religion. They argue that they should have been allowed to enter the danger area and accept the danger involved from atomic explosions.[2] This, they contend, was their way of worshipping God.

While recognizing that the First Amendment to the Constitution expressly forbids legislation prohibiting

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[2]This argument is premised upon the assumption that it was not their purpose to halt the tests—an assumption hardly warranted by their announced intention contained in the January 8, 1958 letter to President Eisenhower (2 R. 40).

the free exercise of religion, the Supreme Court in *Reynolds v. United States,* 98 U.S. 145, 164, said:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties, or subversive of good order.

The court had before it the question of the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong. The court went on to say, at page 166:

> . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

In answering these questions in the negative and in affirming that a man cannot excuse his practices because of his religious belief, the court said, at page 167:

> . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

To say that the acts sought to be done by these defendants would be done in the exercise of religious belief, and therefore would be under the protection of the constitutional guarantee of religious freedom, is "altogether a sophistical plea." Since the First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,

it is pure sophistry indeed to say that the Regulation or the restraining order abridged religious freedom and rights of conscience of the defendants in violation of that amendment.

II.

THE PROMULGATION OF THE COMMISSION REGULATION BARRING ENTRY INTO A PRESCRIBED DANGER AREA BY PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES DID NOT CONTRAVENE THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

In our argument in the *Reynolds* case under Point IV we discussed the question of the due process requirements of notice and hearing relating to the promulgation of the contested Regulation, but did not discuss the requirements of the Administrative Procedure Act. Appellants here raise this question by urging that the Regulation was invalid as not being promulgated in conformity with the provisions of the Administrative Procedure Act requiring notice and hearing (presumably referring to 5 U.S.C. 1000, *et seq.*).

A. Appellants' assertions plainly do not withstand analysis. Section 4 of the Administrative Procedure Act provides generally for advance notice of proposed rule making and public procedure on the rule making itself. This statutory enjoinder, however, is subject to two significant qualifications in that there is excepted therefrom rule making which involves, *inter alia,* "any military, naval or foreign affairs function of the United States" and "any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are * * * contrary to the public interest". (5 U.S.C. 1003).

Consonant with the foregoing, there is found in the disputed Commission Regulation, the following prefatory statement (22 F.R. 2401; see Appendix A):

> In view of the importance of these tests to the *national defense,* the potential hazard to the health and safety of individuals who enter the danger area, and the early starting date of the tests, the Atomic Energy Commission has found that general notice of proposed rule making and public procedure thereon would be contrary to the public interest; and that good cause exists why these rules should be made effective without the customary period of notice.

Thus, there appears on the face of the questioned Regulation a statement of factors sufficient to bring the rule making procedure within the aforementioned exceptions of 5 U.S.C. 1003. This conclusion is rein-

forced by a more detailed consideration of these exceptions and their impact in this case.

The "military affairs" exception previously referred to is peculiarly appropriate for application here. Of this exception the authoritative Attorney General's Manual on the Administrative Procedure Act[3] states (at p. 26):

> "* * * *any military, naval, or foreign affairs function of the United States"*. The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under Section 202(c) of the Federal Power Act (16 U.S.C. 824 a(c)). Sen. Rep. p. 39 (Sen. Doc. p. 225); Senate Hearings (1941) p. 502.[4]

That the nuclear weapons testing performed at the Eniwetok Proving Ground involves the exercise of a "military function" cannot seriously be questioned. As even the most casual examination of the Atomic Energy Act will reveal, the Commission is charged with significant responsibilities directly connected with the military defense of the United States (Sec., e.g., 42 U.S.C. §§ 2011-2013, 2035(a), 2037, 2121, 2153, 2162, 2163). Section 91(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2121(a), pursuant to which nuclear

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[3]Cf. *Kansas City Power and Light Co. v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), certiorari denied 350 U.S. 884.

[4]See also, Senate Report No. 752, 79th Cong., 1st Sess. p. 5.

weapons tests are conducted, expressly authorizes the Commission to "conduct experiments and do research and development work in the *military* application of atomic energy," and such tests are carried out, with Presidential approval, in cooperation with the Department of Defense. It would, therefore, seem apparent that this Regulation, implementing as it does the exercise of a Commission function "of major importance to the defense of the United States" (22 F.R. 2401), falls within the "military function" exception of 5 U.S.C. 1003.

In addition to the "military function" exception—which requires for its applicability no express statement of exception in the Regulation—Section 4 of the Administrative Procedure Act provides for other, stated, departure from the notice and public procedure requirements. Included among the latter is "any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U. S.C. 1004(a)). This additional basis for exception was spelled out, as required, in the preface to the Regulation in question. Appellants cannot successfully take issue with the sufficiency of this prefatory statement. The exceptions set forth in Section 4(a) are written in the alternative so that if it is "impracticable, unnecessary *or* contrary to the public interest" the agency may dispense with notice and public procedure. Accordingly, it was entirely ap-

propriate that the prefatory statement in the Regulation made reference solely to the "public interest" factor. Cf., Attorney General's Manual, supra, at p. 30.

Appellants emphasize the fact that their intention to sail into the test area was made known to responsible Government officials as early as January, 1958, and that, accordingly, the Commission had ample time for issuance of notice and the holding of a hearing prior to promulgation of the Regulation. Such an argument, however, disregards a number of contrary considerations. The determination as to when this Regulation would issue and whether public procedure should be allowed thereon was dependent on a complex of factors. To be gauged and taken into consideration in this regard were such things as the contemplated starting date of the test series, the actual impending danger of someone entering the test area, and (although the Regulation applied only to persons subject to the jurisdiction of the United States) possible foreign reaction to such a restriction. Patently, these considerations involved matters of Executive judgment. On the basis of information available to it, and after considering the views of the Government agencies concerned, the Commission determined that the "public interest" required issuance of the Regulation at the time and in the manner in which it was done. Such circumstances militate for according the Commission determination a heavy weight.

B. The additional argument which appellants seek to make in their brief, i.e., "that the regulation was

directed specifically to prevent these four appellants from making their non-violent protest" adds nothing to the argument advanced by Reynolds in Point IV B of his brief. The factors which the Commission determined to be sufficient to dispense with notice are the same in both cases and hence are answered in the *Reynolds* brief.

Appellants' argument that the Regulation issued was adjudicatory of their rights is likewise without merit.

The Regulation here in issue was not aimed specifically at these appellants although their actions may have prompted the promulgation of the Regulation. All United States nationals alike were affected by the Regulation and nothing that appellants had done, as yet, was declared illegal. Rather what was proscribed by the Regulation was future conduct of appellants as well as any other national who may choose to enter the danger area (*e.g., Reynolds*).

Therefore, if it were proper to dispense with notice as to appellant Reynolds, it was equally proper to dispense with notice as to appellants.

Moreover, in no sense of the word can this be considered a Bill of Attainder as appellants seem to imply.

Bills of Attainder are legislative acts that apply to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial (*United States v. Lovett,* 328 U.S. 303, 315).

Since the Regulation was not directed against named individuals but rather against "nationals" as a group, the argument lacks merit.

In *American Communications Ass'n v. Douds,* 339 U.S. 382, the court upheld the validity of Section 9h of the National Labor Relations Act in the face of an attack made upon the ground that the Section was violative of the Constitution as a Bill of Attainder. In distinguishing the *Lovett* case, *supra,* the court said (*id.,* at 414):

> Here the intention is to forestall future dangerous acts; there is no one who may not by voluntary alteration of the loyalty which impels him to action, become eligible to sign the affidavit. We cannot conclude that this section is a Bill of Attainder.

Here, by the same token, the intention of the Commission was to forestall *future* action. Since past action of the appellants was not declared unlawful by the Commission, by application of the rationale in *American Communications Ass'n v. Douds, supra,* the Regulation cannot be considered a Bill of Attainder.

It is not disputed here that the action of the appellants prompted the Atomic Energy Commission to issue the Regulation here in issue.

However, the fact that this knowledge may have prompted the Regulation in no way impairs the validity of the Regulation itself. Indeed, it has been said:

> One step in the discovery of legislative meaning or intent is the ascertainment of the legisla-

> tive purpose, i.e., the reasons which prompted the enactment of the law. * * * In seeking to ascertain the legislative purpose, it is proper to look at the circumstances existing at the time of the enactment of the statute, to the necessity for the law, the evils intended to be cured by it, to the intended remedy, and to the law as it existed prior to such enactment. *Otoe and Missouria Tribe of Indians v. United States,* 131 F. Supp. 265, 272, certiorari denied, 350 U.S. 848.

It has repeatedly been held also that resort to Legislative History is proper to ascertain the legislative intent. See *United States v. Great Northern Ry.,* 287 U.S. 144; *Duplex Printing Press v. Deering,* 254 U.S. 443.

Indeed, the legislative history of many of our statutes contains recitals setting forth reasons prompting the passage of such acts.

Certainly if judicial pronouncements condoning the practice of inquiring into the contemporaneous events to determine congressional intent have been made, the very fact that these events prompted the passage of the act could not in any way affect the validity of the act itself.

Judicial recognition has also been accorded to events which prompted legislation directed at particular groups of individuals. In *Galvan v. Press,* 347 U.S. 522, 529, the court took cognizance of the events which prompted the enactment of the statute:

> On the basis of extensive investigation Congress made many findings, including that in § 2

> (1) of the [Internal Security] Act that the "Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship," *and made present or former membership in the Communist Party, in and of itself, a ground for deportation.* (Emphasis supplied.)

And again in *American Communications Ass'n v. Douds, supra,* at 389, the court noted:

> It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Certainly the very acts of those individuals who would be affected by the statute prompted enactment of the legislation, and in no way whatsoever impaired the validity of the statute.

Analogously, contemporary events, relating to the promulgation of a regulation can be resorted to in order to ascertain the purpose of a regulation, and these events can be the motivating factors for the Regulation itself.

III.

APPELLANTS HAVE NO STANDING HERE TO ATTACK THE REGULATION OR THE ACT UNDER WHICH IT WAS ISSUED.

> No one, no matter * * * how righteous his private motive, can be judge in his own case.
>
> * * * * *
>
> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper.
>
> Mr. Justice Frankfurter, concurring in *United States v. Mine Workers,* 330 U.S. 258, 308-9, 309-10.

This Court in *Colegrove v. United States,* 176 F.2d 614, 616, said:

> It is settled law that unless an injunction is void its propriety must be tested by appeal and not by disobedience.

An injunction is not void if the court issuing it had jurisdiction over the subject matter and person. This is true without regard even for the constitutionality of the Act (or regulation) under which the order is issued. *United States v. Mine Workers, supra,* at 293, and cases there cited.

It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction. *Carter v. United States,* 135 F.2d 858, cited with approval in *United States v. Mine Workers, supra* at 292.

The *Mine Workers* case is undoubtedly the key case here and the Court's attention is respectfully invited to the entire part II, 330 U.S. 258 at 289-295, as well as to that part of Mr. Justice Frankfurter's concurring opinion at 307-312.

The situation is analogous here. The court below unquestionably had jurisdiction over the persons of the appellants, and it would seem specious to argue that it did not have jurisdiction over the subject matter. That the court would have to resolve substantial questions of law before granting a permanent injunction is granted. Acting upon a statute and a regulation valid on their faces, the court's action in issuing a temporary restraining order and a preliminary injunction to preserve the *status quo* pending a decision on the petition for a permanent injunction (or even upon its own jurisdiction) could hardly be called frivolous usurpation. The appellants, in making their private determination of the law, acted at their peril. Their disobedience was punishable as criminal contempt.

CONCLUSION.

The judgments should be affirmed.

Dated, Honolulu, Hawaii,
March 12, 1959.

Respectfully submitted,

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Internal Security Division,

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United States Attorney,
District of Hawaii,

Attorneys for Appellee.

(Appendix A Follows.)

Appendix "A"

lowing rules are published as a document subject to codification, to be effective upon filing with the FEDERAL REGISTER:

Authority: §§ 112.1 to 112.4 issued under sec. 161, 68 Stat. 948, as amended; 42 U.S.C. 2201. Interpret or apply secs. 2, 3, 91, 68 Stat. 921, as amended, 922, 936; 42 U.S.C. 2012, 2013, 2121. For the purposes of sec. 223, 68 Stat. 958; 42 U.S.C. 2273, § 112.4 issued under sec. 161 i, 68 Stat. 949, 42 U.S.C. 2201 (i).

§ 112.1 *Purpose.* The regulations in this part are issued in order to permit the Atomic Energy Commission in the interest of the United States to exercise its authority pursuant to section 91 a. of the Atomic Energy Act of 1954, as efficiently and expeditiously as possible with a minimum hazard to the health and safety of the public.

§ 112.2 *Scope.* This part applies to all United States citizens and to all other persons subject to the jurisdiction of the United States, its Territories and possessions.

§ 112.3 *Definitions.* As used in this part:

(a) "Danger area" means that area established, effective April 5, 1958, encompassing the Bikini and Eniwetok Atolls, Marshall Islands and which is bounded by a line joining the following geographic coordinates:

18° 30′ N., 156° 00′ E.
18° 30′ N., 170° 00′ E.
11° 30′ N., 170° 00′ E.
11° 30′ N., 166° 16′ E.
10° 15′ N., 166° 16′ E.
10° 15′ N., 156° 00′ E.

(b) "HARDTACK test series" means that series of nuclear tests to be conducted by the Atomic Energy Commission and the Department of Defense at the Eniwetok Proving Ground located within the danger area as defined in paragraph (a) of this section and which are to begin in April 1958, and end at an announced time during the calendar year 1958.[5]

§ 112.4 *Prohibition.* No United States citizen or other person who is within the scope of this part shall enter, attempt to enter or conspire to enter the danger area during the continuation of the HARDTACK test series, except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense.

Dated at Germantown, Md., this 9th day of April 1958.

For the Atomic Energy Commission,

K. E. FIELDS,
General Manager.

[F. R. Doc. 58-2716; Filed, Apr. 11, 1958; 8:50 a.m.]

[5]This Regulation was withdrawn on September 8, 1958 (23 F.R. 6974).